(1) Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JEANNETTE M. OSBORNE, an individual, and Administratrix of the Estate of STEPHEN K. OSBORNE, Deceased,

Petitioner,

vs.

CAMBRIDGE TOWNSHIP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED

After a jury trial on the merits of a wrongful death/survival action brought by the widow of a 27-year-old father of three whose death resulted from the negligence of a township, a jury on April 24, 1998 unanimously awarded Plaintiff $3,892,243.20. Comparative negligence of the Township was assessed at 75% relative to its failure to warn and protect decedent from a fallen tree blocking a township road. [app. 69a-70a]. Crawford County Court of Common Pleas in its Memorandum and Order of September 14, 1998, affirmed and molded the verdict to $500;000.00, the statutory cap, plus $313,255.53 in delay damages, for a total verdict of $813,255.53. The Trial Court found that Plaintiff had established the proof required to meet an exception to governmental immunity under 42 Pa.C.S. §8542(b)(4) of the Political Subdivision Tort Claims Act. [app. 1a-22a].

On appeal, the Commonwealth Court of Pennsylvania foreclosed liability by holding that the dangerous condition was "on" rather than "of" the road. This distinction was contrary to precedent established by the Pennsylvania Supreme Court. Appeal to the Supreme Court of Pennsylvania was denied, thus allowing the erroneous Opinion to stand. The statute meanwhile has been applied differently in other cases, leaving the question of governmental immunity in total disarray. The irrational refusal to grant allocatur perpetuates an uneven application of the statute which is repugnant to the United States Constitution. More specifically, this petition raises the following question:

(1) Whether the Pennsylvania Supreme Court's uneven application of the Pennsylvania immunity statute violates the due process and equal protection clauses of the U.S. Constitution.

PARTIES TO THE PROCEEDING

The interested party, Petitioner, Pennsylvania Supreme Court at Docket Number 705 W.D. Allocatur (1999) is as follows, Jeannette M. Osborne, an individual and Administratrix of the Estate of Stephen K. Osborne, Deceased.

The Respondent to this Petition is Cambridge Township, Pennsylvania.

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Petitioners respectfully pray that a Writ of Certiorari issue to review the Order of the Supreme Court of Pennsylvania which denied allocatur, allowing the Order of the Commonwealth Court dismissing the case to stand.

OPINIONS BELOW

The relevant reported and unreported Opinions and Orders appear in the appendix hereto ("app.") beginning at the page indicated, as follows: Opinion and Order of the Crawford County Court of Common Pleas dated September 14, 1998, unreported [app. 1a]; Order and Opinion of the Commonwealth Court of Pennsylvania reported at 736 A.2d 715 (Pa.Cmwlth. 1999) [app. 23a]; Order of the Pennsylvania Commonwealth Court denying Petition for Reconsideration [app. 46a]; Order of the Pennsylvania Supreme Court denying Allocatur reported at 759 A.2d 925 [app. 48a]; and Order of the Pennsylvania Supreme Court denying Petition for Reconsideration reported at 2000 Pa.LEXIS 2011 (Pa. August 21, 2000) [app. 49a].

STATEMENT OF JURISDICTION

The Order of the Pennsylvania Supreme Court denying Allocatur was filed on May 11, 2000, and a timely filed Petition for Reconsideration was denied on August 21, 2000. This Court has jurisdiction to review the Order of the Supreme Court of Pennsylvania by Writ of Certiorari pursuant to 28 U.S.C.S. §1257(a). The Attorney General of the Commonwealth of Pennsylvania has been served with this Petition pursuant to 28 U.S.C. §2403(b) and Supreme Court Rule 29(4)(c).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment of the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Introduction

This case must be heard because of a substantial intervening circumstance which has been ignored by the Pennsylvania Supreme Court. In *Jones v. SEPTA,* 748 A.2d 1271 (Pa.Cmwlth. 2000), Commonwealth Court President Judge Doyle in his dissent underscores the complete confusion created by his sister Court's decision in the *Osborne* case. He clearly states that *Osborne* was wrongly decided. [app. 50a-61a]. Unfortunately, the Supreme Court of Pennsylvania has refused to review the error.

Stephen Osborne died as a result of striking an oak tree left to obstruct a Township highway without flares or warnings [app. 69a-70a]. Although Defendant Township admitted that it had the duty to maintain the road in question, and a Township supervisor had notice within a sufficient amount of time to have taken action, nothing was done to have protected Mr. Osborne. Although a well reasoned Trial Court Memorandum affirmed the

jury verdict in favor of the widow, and although the Trial Court's decision had ample support in the record, the Appellate Courts of Pennsylvania nullified the jury verdict in direct conflict with precedent of the Pennsylvania Supreme Court. The decisions of the Pennsylvania Appellate Courts in this case have created unnecessary confusion and have violated the constitutional rights of the Petitioner and others similarly situated under the Fourteenth Amendment to the United States Constitution. Further, the decision allows Townships to ignore obvious hazardous conditions to motorists within the Commonwealth of Pennsylvania.

This Petition asks this Court to exercise its supervisory power to remedy the judicial errors suffered by Petitioner as a result of the Commonwealth Court's extreme departure from the accepted and usual course of reviewing a Trial Court's decision. Respectfully, Petitioner requests this Court to make clear to the Pennsylvania Supreme Court and other lower Courts around the country that State statutes once they create remedies, must be evenly applied

1. The Petitioners

Petitioners are the widow, Jeannette M. Osborne, and her three minor children.

2. Stage in the Proceedings when the Federal Questions were raised

Petitioner's Application for Reconsideration of Denial of Allowance of Appeal filed on May 24, 2000, set forth the following grounds for reconsideration:

1. President Judge Doyle, Commonwealth Court, has succinctly sent a message in his February 2000 dissenting Opinion in *Jones v. SEPTA, supra.*. Judge Doyle states that there

is serious confusion over the application of governmental immunity in the *Osborne* and *Jones, supra.*, Commonwealth Court decisions.

2. The Commonwealth Court's gross misapplication of this Court's prior rulings in *Kilgore v. City of Philadelphia,* 553 Pa. 22, 717 A.2d 514, n.4 (1998), and *Grieff v. Reisinger*, 548 PA 13, 693 A.2d 195 (1997), has created an unjust and unwarranted result that is noted with concern by President Judge Doyle.

3. If this case is not reversed by the Supreme Court, the message to those responsible for maintaining Pennsylvania roads and highways is **that they need not be concerned about possible redress against their failures to act**. They can do nothing to maintain the roads such as clearing away fallen trees and other debris, and even if it causes the death of a young father, and even if a jury and Trial Court find them responsible, they can **avoid all responsibility**.

4. The rights of a citizen to have a case decided by a jury under the Seventh Amendment to the U.S. Constitution are in question when the Commonwealth Court can reject the evidence found credible and compelling by a jury, unanimous in its decision. The verdict was affirmed by a Trial Court in a well reasoned decision, but the Commonwealth Court twisted the evidence to reach a contrary result. To refuse to hear this case is also to send a message that juries and trial judges do not count in our justice system.

5. The Osborne decision of the Commonwealth Court leaves the issue of governmental immunity in complete disarray. To allow this erroneous decision to stand will cripple the rights of Plaintiffs who have been harmed by the government, such state of the law not being the intention of either the Supreme Court or the Legislature as President Judge Doyle states in his dissent:

> The Osborne Court noted that the real property exception to governmental immunity does not contain the core language, but rather states that immunity is waived for injuries caused by the 'care, custody or control' of real property and therefore explains away the Supreme Court's decision to abandon the on/of distinction in *Grieff* and *Kilgore*. I disagree with this analysis and believe that *Osborne* has carved out an exception to the symmetry of the overall statutory scheme and has created a dichotomy between sovereign immunity and governmental immunity which was never intended by the Legislature nor by the Supreme Court in *Grieff* and *Kilgore*.
>
> For the reasons stated in the body of this dissenting Opinion, I believe that *Osborne* fails to properly consider the change in the law created by the Supreme Court in *Grieff* and *Kilgore*. Unless the Supreme Court reverses other established case law, *Osborne* violates the well established rule that the exceptions to sovereign immunity and governmental immunity are to be interpreted consistently, again pointing out that the Supreme Court has specifically concluded that the real property exception to governmental immunity is to be construed in a manner that is consistent with the other exceptions to immunity. 748 A.2d 1271 [app. 60a-61a].

In the above-mentioned grounds for reconsideration, Petitioner raised the issues of uneven application of a State statute, thereby questioning its validity, pursuant to 28 U.S.C.S. §1257(a).

The erroneous rulings of the Pennsylvania Appellate Courts have called into question the validity of the Pennsylvania Governmental Immunities Statute at 42 Pa.C.S. §8542 of the Political Subdivision Tort Claims Act. [app. 63a]. The inconsistently interpreted statute calls attention to fundamental flaws in the statute's wording which result in confusion. This flawed statute is in violation of Petitioner's due process and equal protection rights under the U.S. Constitution.

Accordingly, Petitioner respectfully requests that this Petition be granted to assure that the rights created by the Commonwealth in the Political Subdivision Tort Claims Act are fairly applied.

REASONS FOR GRANTING THE WRIT

I. A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THE PENNSYLVANIA SUPREME COURT'S UNEVEN APPLICATION AND ENFORCEMENT OF THE PENNSYLVANIA GOVERNMENTAL IMMUNITY STATUTE CALLS THAT VERY STATUTE INTO QUESTION AS REPUGNANT TO THE RIGHTS OF PETITIONER AND OTHERS SO SITUATED UNDER THE U.S. CONSTITUTION

This Petition raises significant issues regarding the validity of the Governmental Immunity Statute of Pennsylvania and its irrational application. Guidance from this Court is required in order to assure uniform interpretation of the Statute and to prevent the abridgment of litigants' constitutional rights.

The unequal application of the Governmental Immunity Statute in this case is but one example of the abuse that can result unless this Court clarifies the obligation of the Appellate Courts to evenly and consistently interpret the statute. Once the legislature of Pennsylvania carved out the tort liability of its

political subdivisions, it is incumbent upon the highest tribunal of Pennsylvania to ensure that this statute is applied fairly. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 71 L.Ed 265, 102 S.Ct. 1148 (1982); *Boddie v. Connecticut*, 401 U.S. 371, 28 L.Ed 2d 113, 91 S.Ct. 780 (1971).

Petitioner respectfully submits that the Commonwealth Court misapprehended material facts of record, resulting in a ruling contrary to relevant precedent, which erroneous ruling was allowed to stand by the Pennsylvania Supreme Court. The Commonwealth Court erred in its conversion of the Trial Court's stated reason for sustaining the verdict into a pure question of law, when it was plain that the Trial Court's decision rested upon discretionary matters. The Court of Common Pleas Judge in this case determined that evidence was provided to the jury that the right-of-way extended 25 feet from the center of Route T680/Center Road; and stated:

> This is sufficient evidence from which the jury could reasonably conclude that the Township was responsible for maintaining its roads and right-of-ways, the tree which had fallen across the Township road was subject to this duty of maintenance and, therefore, the fallen tree was in the care, custody and control of the Defendant.

[app. 5a] In addition, the Trial Court also found that there was sufficient evidence which justified the jury's conclusion that the Township had adequate notice to have taken measures to prevent the fatal accident. [app. 7a-8a]. The Commonwealth Court selectively reviewed the record, and ignored evidence favorable to the Plaintiff to justify its dismissal of the case. Whereas the jury determined that all the elements necessary to satisfy the requirements of the exceptions of the governmental immunity were present, the Commonwealth Court re-wrote the facts to

accommodate and aid in establishing the validity of its opinion. This decision was sustained by the Pennsylvania Supreme Court despite its previous holding that:

> When considering whether the record supports the Trial Court's decision, we generally defer to the Trial Court's judgment because, by virtue of its position, it is uniquely qualified to determine factual matters.

Coker v. S.M. Flickinger Co., Inc., 553 Pa. 441, 451, 625 A.2d 1181, 1187 (1993). The Appellate Court deliberately and intentionally ignored uncontradicted evidence of record that established that, before its uprooting, the tree stood within the Township's right-of-way and that **certainly after the uprooting and fall** the tree had to be in the Township's right-of-way. Furthermore, the Township stipulated that:

1. The cause of death of the Plaintiff-Decedent, Stephen K. Osborne was the result of the vehicle he was operating striking the tree lying across Route T680/Center Road, Cambridge Township, Cambridge Springs, Pennsylvania 16043 on July 28, 1993.

2. Route T680/Center Road, Cambridge Township, Cambridge Springs, Pennsylvania 16043 is maintained by Cambridge Township.

In the failure to apply these facts of record as affirmed by the Trial Court, the Commonwealth Court and ultimately the Supreme Court of Pennsylvania, unfairly denied the rights of Petitioners.

Yet, the Supreme Court has granted tort liability in cases involving similar facts, i.e., where the obstruction or hazard is on

rather than of the government property as in *Kilgore*, *supra.* and *Grieff, supra.* Furthermore, without basis, the Supreme Court of Pennsylvania has randomly granted allocatur in *Jones v. SEPTA*, but not in *Osborne*.

Petitioner respectfully prays that a Writ of Certiorari be issued to review the Orders of the Pennsylvania Supreme Court which nullified the jury verdict in favor of Petitioner contrary to the Supreme Court's own precedent. This unsettled and erroneous ruling is repugnant to the U.S. Constitution and gives this Court jurisdiction. See, *Japan Line, ltd., et al., v County of Los Angeles*, 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed. 336 (1979). The conflict between the Pennsylvania immunities statute and the constitutional rights denied by its unequal application require review by this Court pursuant to 28 U.S.C.S. §1257(a).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE COURT OF COMMON PLEAS OF CRAWFORD COUNTY, PENNSYLVANIA CIVIL ACTION-LAW

JEANETTE M. OSBORNE, an individual and Administratrix of the Estate of STEPHEN K. OSBORNE, Deceased,	:	
Plaintiff	:	
v.	:	
CAMBRIDGE TOWNSHIP	:	**No. A.D. 1995-642**
Defendant	:	

Louis M. Tarasi, Jr., Esq., for Plaintiff
Christina K. Hurnyak, Esq., for Plaintiff
John O. Dodick Esq., for Defendant

MEMORANDUM AND ORDER

Anthony J. Vardaro, J. **September 14, 1998**

The matter before this Court arises from an action brought under provisions of Pennsylvania's Wrongful Death and Survival Acts by the Plaintiff, Jeanette M. Osborne, in her capacity as Administratrix of her husband's estate. The claims were brought against the Defendant, Cambridge Township, as a result of a fatal motor vehicle accident which occurred on a Township roadway. It was alleged at trial that the Defendant

was negligent in its failure to take measures to warn of a large tree which had fallen across one of its roads and for which the Township had timely notice of. The decedent was killed instantly when the automobile he was driving struck the fallen tree. The Plaintiff's claims were tried before a jury which returned a verdict in her favor for an aggregate total of $3,892,243.20. Negligence was established at 25% for the decedent and 75% for the Defendant. The Defendant has filed motions for Judgment n.o.v., New Trial, Remittitur, and a Molding of the Verdict. The Plaintiff has filed a motion to Mold Verdict, Award Rule 238 Damages and Post-Verdict Interest. We turn now to address these matters.

Discussion

I. Motion For Judgment n.o.v.

A. Failure to establish care, custody or control.

The Defendant asserts that a compulsory nonsuit or a directed verdict should have been granted in favor of the Defendant because the evidence set forth at trial failed to establish that the tree which had fallen across the roadway was within the right-of-way of Cambridge Township.

The general immunity of local agencies caused by acts or omissions of the agency or its employees is provided in 42 Pa.C.S. § 8541. Exceptions to the general grant of immunity are provided in 42 Pa.C.S. § 8542. The specific exception alleged at trial by the Plaintiff to establish liability on behalf of the Defendant provides the following:

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(4) *Tree, traffic controls and street lighting.* - A dangerous condition of trees, traffic signs, lights or other traffic controls, street lights or street lighting under care, custody or control of the local agency, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.

42 Pa.C.S. § 8542(b)(4).

The Defendant first argues that the Plaintiff failed to establish at trial that the tree which had fallen on the township's roadway was under the care, custody or control of the local agency. The fact that the tree had fallen across and upon the Township's roadway, in and of itself, the Defendant argues, does not establish that the tree was in the care, custody and control of the Township. In primary support of this assertion the Defendant cites Marker v. Commonwealth of Pennsylvania Department of Transportation, 677 A.2d 345 (Pa. Cmwlth. 1996) and Babcock v. Commonwealth to Pennsylvania Department of Transportation, 156 Pa. Cmwlth. 69, 626 A.2d 672, *alloc. denied,* 536 Pa. 649, 639 A.2d 33 (1994). These cases, however,

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were decided under an entirely different statutory authority[1] than that under which this action was brought and turn upon distinctions irrelevant to the Plaintiffs cause of action. These cases, therefore, fail to advance the Defendant's argument.

The Plaintiff suggests that the issue of care, custody and control was conclusively established by the fact that the Township went to the scene after the accident, stopped traffic and removed the tree. We find this argument unpersuasive as well. *See, e.g,* Mylet v. Adamsky, 139 Pa. Cmwlth. 637, 591 A.2d 341 (1991) (that township police placed flares and re-routed traffic around a tree which had fallen across a state roadway did not establish that township exercised care, custody and control of tree).

Evidence which the jury could consider, however, in concluding that the subject tree was in the care, custody and control of the Township were two admissions of the Defendant which were read to the jury. By the parties' stipulation, the following were offered:

1. The cause of death of the Plaintiff-Decedent, Stephen K. Osborne was the result of the vehicle he was operating striking a tree lying across Route T680/Center Road, Cambridge Township, Cambridge Springs PA 16403 on July 28, 1993.

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1. 42 Pa.C.S. § 8522(b)(4), known as the "real estate exception" to Commonwealth immunity.

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2. Route T680/Center Road, Cambridge Township, Cambridge Springs PA 16403 is maintained by Cambridge Township.

At trial the Plaintiff also offered evidence that the Township maintained a right-of-way which extended 25 feet in both directions from the center of Route T680/Center Road. (Tr. at 50)[2] Therefore, at trial evidence was provided to the jury that both the road and the right-of -way upon which the tree had fallen were maintained by the Defendant. This is sufficient evidence from which the jury could reasonably conclude that the the Township was responsible for maintaining its roads and right-of-ways, the tree which had fallen accross the Township road was subject to this duty of maintenance and, therefore, the fallen tree was in the care, custody and control of the Defendant.

A motion for compulsory nonsuit may only be granted where, viewing all of the evidence including all reasonable inferences which may be drawn from this evidence in the light most favorable to the Plaintiff, it can only be concluded that the Plaintiff has failed to establish a right to relief. I Goodrich-Amram 2d § 230.1:4. On the evidence presented by the Plaintiff, no such conclusion could reasonably be drawn. We find no case law which would require, as the Defendant would suggest, that

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2. References to trial transcripts are to the Defendant's reproduced Transcripts of Proceedings which have been bound in consecutive order and not the official Transcripts of Proceedings.

for the jury to find that the subject tree was under the care, custody and control of the Township that the subject tree, *before* it came to rest on Township property, must have first been located on property under the care, custody and control of the Township.

B. **Failure to establish sufficient time to take preventative measures.**

The Defendant next argues that the evidence failed to establish that the Township had actual or constructive notice of the fallen tree in sufficient time to have taken preventative measures. At trial Mr. Styborski testified that after observing the fallen tree on the night in question he asked his wife to call the Township supervisor, Mr. Herman, to advise him of the fallen tree. (Tr. at 61.) Mrs. Stryborski's testimony confirmed her husband's testimony that she had called Mr. Herman on the night in question at some time before 9:00 p.m.. (Tr at 84.) Mr. Styborski, however, bad given a statement to an investigator, some time not long after the accident, in which he indicated that it was he who had called Mr. Herman a couple of hours before the accident had occurred. Pl. Ex. 1.At the time of trial Mr. Styborski indicated that perhaps he had made such a statement, but he may have exaggerated the time frame. (Tr. at 70.) Mr. Herman testified at trial that the first time that he was aware of the fallen tree was when he awoke to get ready for work at approximately 9:50 p.m.. It was at this time, he testified, that he was informed by a phone call from Mrs. Styborski that an accident had just occurred. (Tr. at 121.) Mrs. Herman, in her deposition, had indicated that she had received a phone call from Mr. Styborski earlier on the night in question to inform Mr.

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Herman of the fallen tree and that she had told her husband of the call to which he responded "Well okay". (Tr at 104, 107.) At trial, however, both Mr. and Mrs. Herman denied that such a discourse took place.

The question of whether the Defendant had notice was central to the outcome of this action. It is undeniable that this issue was hotly disputed. It a well-established principle, however, that "where there is *any* evidence which alone would justify an inference of disputed fact, it must go to the jury, no matter how strong or persuasive may be the countervailing proof" Hefferman v. Rosser, 419 Pa. 550, 215 A.2d 655, 657 (1966) (footnote omitted). Under Pennsylvania law it is not required "that every fact or circumstance point unerringly to liability; it is enough that there be sufficient facts for the jury to say reasonably that the preponderance favors liability... " Jones v. Treegoob, 433 Pa. 225, 249 A.2d 352, 355 (1969). It is not the role of the court to "weigh evidence and determine the truth of the matter asserted, this issue should be properly left for the jury to decide." Taylor v. Jackson, 164 Pa.Cmwlth. 482, 643 A.2d 771 (1994).

Whether or not the Township had notice of the fallen tree in time to have taken preventative measures is a question of fact. Once there is sufficient testimony to establish that the Township had notice of a dangerous condition on its road, the ultimate question of the Township's liability must be properly left to the jury. Although there was conflicting evidence as to the time of the notice given to Mr. Herman, it cannot be said that there was insufficient evidence from which to justify the jury's conclusion that Mr. Hennan had adequate notice to have taken measures to

prevent the fatal accident. Connelly Containers, Inc. v. Pennsylvania R.R., 222 Pa.Super. 7, 292 A.2d 528 (1972) (where material facts are in dispute the jury must determine which to believe), Morris v. Peckyno, 202 Pa.Super. 490, 198 A.2d 396 (1964) (the issue of the credibility of a witness is always a matter for the jury).

C. **Verdict against weight of evidence.**

The Defendant next argues that the jury verdict was against the weight of the evidence on the issues of negligence and comparative negligence. In effect, the Defendant asks this Court to again weigh the evidence which was presented at trial and reevaluate the jury's factual findings. This we will not do. The traditional standard in Pennsylvania for purposes of a "weight of the evidence" inquiry is whether the "jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. "Burrel v. Philadelphia Electric Co., 438 Pa. 286, 265 A.2d 516, 517-518 (1970). In a case where the issue of the credibility of witnesses is present, as in the instant action, the weight to be assigned the testimony of various witnesses is within the exclusive province of the jury. Smith v. Shaffer, 511 Pa. 421, 515 A.2d 527 (1986). Moreover, the verdict of the jury will be determinative as long as it is based on substantial, albeit conflicting evidence. Standard Pipeline Coating Co. v. Solomon & Teslovich, 344 Pa.Super. 367, 496 A.2d 840 (1985).

Although the preponderance of the evidence which was presented at trial was in conflict and the credibility of the witnesses often placed in doubt, such is the case in most every

trial to one degree or another. We do not find, however, with regard to issues of negligence, contributory negligence or the apportionment of liability that merely because the jury could have justifiably drawn different conclusions based upon the same evidence that the verdict was so utterly contrary to the evidence that "one's sense of justice" is shocked. The test is not whether, on the same evidence, this Court could have reached a different conclusion, but only whether the jury's verdict was so contrary to the evidence that the justice demands this Court provide the Defendant with another opportunity to prevail. Such is not the case.

II. Motion for New Trial

D. Admissibility of vicarious admission

The Defendant next argues that the admission of the testimony of Trace Fosberg regarding the vicarious admission of Township supervisor Larry Tapper was error. At trial Mr. Fosberg, a former employee of the Township, testified that one week after the accident Mr. Tapper had told him that Mr. Herman, a Township supervisor, had approximately one hour's notice of the fallen tree and that Mr. Herman had done nothing in response to this notice. (Tr. at 165-166.) The Defendant maintains that an objection was made regarding the admissibility of the conversation that Mr. Fosberg had with Mr. Tapper. This assessment is inaccurate. The Defendant objected not to a question posed to Mr. Fosberg regarding a conversation with Mr. Tapper, but to a question regarding why the Township had taken no action in response to a request by Mr. Styborski to address various tree problems. (Tr. at 158.) In response to this question

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Defendant's counsel objected *only* that the witness was incompetent to testify as to why no action was taken by the Township to address Mr. Styborski's requests. (Tr. at 158.) This Court sustained the objection. Contrary to the Defendant's assertion, there was no objection made to Mr. Fosberg testifying as to his conversation with Mr. Tapper, but *only* an objection to Mr. Fosberg's competency to testify as to why the Township did not respond to certain requests. In fact, a side-bar was held before Mr. Fosberg testified about his conversation with Mr. Tapper during which Plaintiffs counsel indicated that the statements made by Mr. Tapper were admissions against interest to which Defendant's counsel made no objection. (Tr. at 155.) As such, this matter was not objected to at trial and, therefore, this issue has been waived. Thompson v. Motch and Merryweather Machinery Co., 358 Pa.Super. 149 516 A.2d 1226 (1986).

E. Admissibility of Township procedure

The Defendant next argues that the admission of testimony from Mr. Fosberg as to what procedure the Township could have taken on the night of the accident was error. Specifically, the Defendant argues that Mr. Fosberg's testimony that other means were available to react to the notice provided which may have provided a quicker response was prejudicial. The Defendant maintains that this testimony was prejudicial because it was speculative in nature and potentially extended the time available to the Defendant to have taken preventative measures.

Mr. Fosberg was asked what procedure the Township would follow if a call came in that a tree was blocking a road and that

barricading was necessary. (Tr. at 177.) Mr. Fosberg's response to the question was in the first person as he explained what he believed that the Township's procedure would have been under the circumstances. Mr. Fosberg, at the time in question, was a Township laborer who had responded to situations similar to those posed in the Plaintiffs query. As such, he was qualified to respond to the question as to what means would have then been available to the Township to provide a quicker response to the notice which was given. The fact that it was answered in the first person did not, by itself, cause the answer to be speculative. Although there was no written policy which reflected Mr. Fosberg's testimony and Mr. Fosberg may have had a bias against a Township supervisor, these issues go to the credibility and weight to be given to his testimony. They do not alone cause the evidence to be inadmissible or unduly prejudicial.

It is less than clear as to how the testimony of Mr. Fosberg could have extended the time available to the Defendant to respond to the notice given. While the testimony of Mr. Fosberg may have established that another means of response which was available to the Township could have been faster and more prudent, it certainly did not extend the time available for the Township to respond.

F . <u>Points for Charge</u>

The Defendant next maintains that it was error to fail to charge the jury on the Defendant's supplemental request for charge No. 1 regarding the unrebutted testimony of Trooper Falkenburg. The Defendant's supplemental request asked for a

jury instruction that if the jury found that the Trooper's testimony that the decedent's vehicle was traveling at 73 mph at the time of the accident was not contradicted by direct testimony of other witnesses, impeached by its own inconsistencies, or of such improbability to not be worthy of belief, then the Plaintiff would be bound by this evidence. Trooper Falkenburg testified, however, that the needle of the speedometer in the decedent's automobile may have jumped up to 73 mph upon impact. (Tr. at 42.) In addition, the Defendant's own expert witness, Mr. Aerni, testified that in his opinion the decedent's automobile, at the time of impact, was traveling between 57 mph and 87 mph. (Tr. at 395.) As such, the testimony of Trooper Falkenburg was not was not only internally inconsistent, but was contradicted by another defense witness.

The Defendant next argues that it was error to refuse the Defendant's jury point for charge requests Nos. 10 and 12 which represent proper legal conclusions which were supported by the evidence. As part of the requested charge at No. 10, the Defendant requested that the Court instruct the jury that the Defendant was contributorily negligent for operating his automobile while under the influence of alcohol to a degree which rendered him incapable of safe driving and while his alcohol content was .10% or greater. At No. 12, the Defendant requested that the court instruct the jury that any person who drives a vehicle in reckless disregard for the safety of persons or his own safety or property is guilty of careless driving under 75 Pa.C.S. § 3714 as well as a charge that a person shall not drive, operate or be in actual physical control of the movement of any vehicle while under the influence of alcohol to a degree which renders the person incapable of safe driving or while the amount

of alcohol by way of blood is .10% or greater as provided in 75 Pa.C.S. § 3731. The use of the explicit language which the Defendant requested was refused. A trial judge is not required to use the exact language of a requested point as long as the form of the charge given to the jury adequately and clearly covers the subject. 10 Std.Pa.Prac. § 59:9. As such, a court may properly refuse a requested point where it instructs the jury correctly and the substance of the charge covers the relevant rules of law proposed by the requesting party. Id. The substance of the Defendant's requested points were covered by charges which set forth the essence of the statutory language requested in broader terms. (Tr. at 284-286.) The Defendant, therefore, suffered no prejudice. *See* Butler v. Kiwi S.A., 412 Pa.Super. 591, 604 A.2d 270 (1992), *appeal denied,* 531 Pa. 65O, 613 A.2d 556 (1992) (requested charge may properly be refused where the substance of the request is given in either a general charge or another specific charge).

The Defendant next asserts that the Court erred in not charging the jury on the issue of assumption of the risk. The Defendant, at point for charge No. 15, requested that the Court instruct the jury on the doctrine of assumption of risk. This request was refused. In Howell v. Clyde, 533 Pa. 151, 620 A.2d 1107 (1993), a plurality decision, assumption of risk as an affirmative defense to be decided by the jury was abolished by the Supreme Court. The Court noted that "to the extent that an assumption of risk analysis is appropriate in any give case, it shall be applied by the court as part of the duty analysis, and not part of the case to be decided by the jury. Id. at 162, 620 A.2d at 1112-13. Accordingly, under this approach:

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> [T]he court may determine that no duty exists only if reasonable minds could not disagree that the plaintiff deliberately and with awareness of *specific risks inherent in the activity* nonetheless engaged in the activity that produced his injury.

Id at ____ , 620 A.2d at 113 (emphasis added). The Court preserved the doctrine, however, "in cases involving express assumption of risk' or cases brought pursuant to 402(A) (strict liability theory), or cases in which assumption of risk is specifically preserved by statute." Id. at 162 n. 10, 620 A.2d at 113 n. 10. There was no evidence presented at trial which would lead reasonable minds to agree that the decedent engaged in the conduct alleged, deliberately and with an awareness of the *Specific risk* which ultimately took his life. Nor was there evidence presented which indicated that the decedent expressly assumed the risk or that a statute has been implicated in which the doctrine has been preserved. As such, the Defendant was not entitled to this requested charge and the case was properly submitted to the jury on a comparative negligence theory.

III. Motion for Remittitur

The Defendant next maintains that the jury did not follow the Court's instructions or the law in offsetting damages under the Wrongful Death and Survival Acts. The jury awarded the following under the Wrongful Death and Survival actions:

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WRONGFUL DEATH

1. Compensation to family for loss of contributions for period from time of accident until date of verdict **$200,317.00**

2. Compensations to family for loss of contributions for period from date of verdict until end of estimated life **$1,387,458.80**

3. Compensation to family for pecuniary value of service, society and comfort had decedent lived. **$367,411.66**

4. Compensation for loss of services that decedent would have contributed to his children **$500,000.00**

TOTAL WRONGFUL DEATH AWARD $2,455,187.46

SURVIVAL ACT

1. Amount decedent would have earned between date of his death and date of verdict **$200,317.00**
   (LESS) Amount decedent would have contributed to family during this same period *(awarded above under Wrongful Death Act)* **$** **-0-**
   (LESS) Amount decedent would have spent for personal maintenance during this same period. . . . . ($ 16,000.00)
   Total incremental contributions . . . . . $ 184.317.00

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2. Amount decedent would have earned between date of verdict and the end of his natural life. **$1,387,458.80**
(LESS) Amount of contributions decedent would have made date of verdict until his natural death (awarded above under **Wrongful Death Act)** . . . . . **$ -O-**
(LESS) Amount decedent would have spent for personal maintenance during same period. **($134,720.00)**

Total contributions until natural death **$1.252.738.80**

TOTAL SURVIVAL ACT AWARD . . . . . **.$1,437,055.80**

It was apparent from the jury's queries that there was considerable confusion as to the manner in which the different awards under each Act were to be reconciled. As one juror explained, "[w]e're so confused it isn't funny." (Tr. at 334.) Specifically, there was an apparent problem understanding why an award given under the Wrongful Death Act would have to be subtracted in the calculation of an award under the Survival Act. As one juror stated during questions to the Court, "[if] I give you two apples, you have two apples, but if I take two apples back from you, you have nothing...we're giving somebody a dollar bill on the first phase...on the second phase we're taking it back." (Tr. at 334-336.) The jury awarded the Plaintiff$200,317.00 under the Wrongful Death Act for the decedent's contributions during the period from his death until the date of the verdict and $1,387,458.80 for the decedent's contributions from the date of the verdict until his projected natural death. These amounts represented the decedent's entire earnings for these periods. That is, the jury, under the Wrongful Death Act, awarded the

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Plaintiffs family the whole of the decedent's estimated earnings for all relevant periods. At this point then, there were no further financial contributions which the decedent could have provided and, consequently, no further financial contributions which the jury could have provided to his estate on his behalf. Everything the decedent may have contributed financially at any time after his death was awarded to his family under the Wrongful Death Act. When the jury awarded damages under the Survival Act, however, they failed to deduct from the decedent's projected earnings that which had been awarded under the Wrongful Death Act. As a result, the decedent's total projected earnings were awarded first to the decedent's family under the Wrongful Death Act and *again,* incorrectly, under the Survival Act. As such, the jury's Award under the Survival Act cannot stand.

It was apparent from the jury's award under the Wrongful Death award that the jury intended that the decedent's family should receive all of his projected life earnings. With their award under that Wrongful Death Act, they accomplished this objective. We are well aware of our limited role in molding a jury's verdict. Richards v. Dravo Corp., 249 Pa.Super. 47, 375 A.2d 750 (1977)(court must not invade the province of the jury). With the clear intent of the jury manifested in their award to the Plaintiffs family under the Wrongful Death Act, however, it is incumbent that we correct the jury's mistake. *See* Krock v. Chroust, 330 Pa.Super. 108, 478 A.2d 1376 (1984) (where the intent of the jury is clear or obvious the court has the power to mold the verdict), Maize v. Atlantic Refining Co., 352 Pa. 51, 41 A.2d 850 (1945) (court may mold a verdict for personal injuries where there is unfairness or mistake). Therefore, the jury's award under the Survival Act will be molded to reflect a

zero award. We will not, however, as the Defendant suggests, offset the Wrongful Death Act award by the personal maintenance costs reflected in the Survival Act award.

The Defendant next argues that the jury in calculating an offset for decedent's personal maintenance was a product of passion, prejudice and partiality. In that the jury's award under the Survival Act has been molded to reflect a zero award, we need not address this issue.

The Defendant argues next that it was error to allow damages under the Wrongful Death Act for the loss of services that Stephen K. Osborne as a father would have contributed to his children such as guidance, tutelage and moral upbringing since these are not a recognized item of damages against a local agency under 42 Pa.C.S. § 8553(c). We find the Defendant's argument that this Court should apply a common law construction to the damages permitted under 42 Pa.C.S. § 8553(d) and deny thereby the Plaintiffs recovery for the loss of consortium of the minor children unsupported by law. *See* Buchecker v. Reading Co., 271 Pa.Super. 35, 412 A.2d 147 (1979) (Under Pennsylvania law a child can recover in a wrongful death action for loss of companionship, comfort, society and guidance of a parent). The references which the Defendant makes to cases which discuss a child's right to recover for a loss of consortium outside of the Wrongful Death Act are irrelevant as to the error asserted and altogether unpersuasive. As such, we find this assertion to be without merit.

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IV. Motion to Mold Verdict Award Rule 238 Delay Damages, and Post-Verdict Interest

The Plaintiff requests that the Court subtract the $5,000 first-party insurance benefit which was received by the Plaintiff from the jury's award and not the statutory cap. We find the analysis provided in Fernandez v. City of Pittsburgh, 164 Pa.Cmwlth.Ct. 662, 643 A.2d 1176 (1994), to be controlling. The Court in Fernandez expressly overruled the holding of Giosa v. School District of Philadelphia, 157 Pa. Cmwlth.Ct. 489, 630 A.2d 511 (1993), which had held that insurance benefits were to deducted from the statutory cap on liability against a municipality and not the jury's award of damages. As such, the $5,000 first-party insurance benefits paid to the Plaintiff will be subtracted from the jury's award and not the statutory cap.

The Plaintiff next requests that the Defendant pay delay damages, in accord with Pa.R.C.P.238, for the period from June 29, 1996 through April 24, 1998. The Defendant argues, however, that to award delay damages would result in an award which exceeds the statutory cap and would, therefore, be improper. We disagree. It is the well-settled law of this Commonwealth that delay damages are to be calculated upon a jury's award and not the statutory cap. Woods v. Department of Transportation, 531 Pa. 2959 612 A.2d 970 (1992). To hold otherwise would frustrate the legislature's goal of encouraging settlements, providing "no incentive for a Commonwealth agency to seek settlement of a major suit". Id. at 972. Moreover, "there would be a distinct disincentive since the delay damages would be based upon a predictable constant and there would then be no unknown which would motivate the Commonwealth to

discuss settlement." Id. As no distinctions are made in the award of delay damages between the Commonwealth and a local agency of government body, delay damages will be awarded on the jury's verdict and not the statutory cap. See Robinson v Jackson, 145 Pa.Cmlth.Ct. 21, 602 A.2d 917 (1992) (delay damages can be assessed against a local agency or government body even where the verdict or modified verdict is for the statutory limits of damages).

The Defendant asserts that the Plaintiff is not entitled to delay damages, as provided by Pa.R.C.P. 238(b)(2), for the period from February 1998 to April 1998 because this period is attributable to the Plaintiffs Motion for Continuance. The Plaintiff argues that the Defendant's request be denied because at the time of the request for continuance the Defendant had not complied with the Plaintiffs discovery demands. Our re-examination of the record, however, reveals that the request for a continuance which was filed by the Plaintiff was in the nature of a Stipulation for Continuance that was signed by counsel for the Defendant. As such, the Defendant,
by stipulation, has effectively waived the right to assert this issue.

Lastly, the Plaintiff requests that this Court apply separate liability limits for each award given by the jury under the Wrongful Death and Survival Acts. We need not address this issue as the Survival Act award will be molded to reflect a zero recovery.

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ORDER

Anthony J. Vardaro, J. September 14, 1998

AND NOW, September 14, 1998, the defendant's Request For Post Trial Relief is denied except that its Motion For Remitter is granted with respect to the award under the Survival Act which is hereby established at zero.

The jury's wrongful death verdict is molded as follows:

The verdict of $2,455,187.46 is reduced by the comparative negligence of the decedent of twenty-five (25) percent resulting in an initial verdict of $1,841,390.60. From that amount is subtracted $5,000 for first party insurance benefits paid.

Delay damages are calculated therefore on the sum of $1,836,390.60.

Those damages are calculated at 9 1/2 percent for 186 days from June 29, 1996, to December 31, 1996, for a total of $88,901.43 during that time period. In addition, there are delay damages calculated at 9.25% from January 1, 1997, through December 31, 1997, for a total of $169,866.13.

Finally, from the period from January 1, 1998, through April 24, 1998, which is 114 days the delay damages are calculated at 9.5% or $54,487.97.1

The total delay damages therefore are $314,255.53 and the verdict is reduced to the statutory cap of $500,000 plus delay

damages for a total verdict of $813,255.53, and the Prothonotary is directed to enter judgment for this amount in favor of the individual plaintiff and against the defendant, Cambridge Township, together with costs and statutory interest at the rate of 6% from the date of the verdict.

BY THE COURT,

/s/ Anthony J. Vardaro, J.

Louis M. Tarasi, Jr., Esq., and
Christina K. Hurnyak, Esq. for Plaintiff
John O. Dodick, Esq., for Defendant

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JEANNETTE M. OSBORNE, an individual and Administratrix of the Estate of STEPHEN K. OSBORNE, Deceased	:	
v.	:	NO. 2755 C.D. 1998
CAMBRIDGE TOWNSHIP, Appellant	:	
JEANNETTE M. OSBORNE, an individual and Administratrix of the Estate of STEPHEN K. OSBORNE, Deceased, Appellant	:	
v.	:	NO.2856 C.D. 1998
CAMBRIDGE TOWNSHIP	:	ARGUED: June 17,1999

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JIM FLAHERTY, Judge
HONORABLE EMIL E. NARICK, Senior Judge

OPINION BY JUDGE PELLEGRINI FILED: July 16, 1999

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Jeannette M. Osborne, individually and as Administratrix of the Estate of her deceased husband, Stephen K. Osborne (Osborne or Decedent), appeals from an order of the Court of Common Pleas of Crawford County (trial court) denying her motion to mold the verdict and award Rule 238 delay damages and post-verdict interest. Cambridge Township (Township) has filed a cross-appeal from that order denying its post-trial motions as well.

This case arises as a result of an automobile accident that occurred around 9:30 p.m. on July 28, 1993, in which Osborne was killed. At the time of the accident, it was dark and raining hard because a storm had just gone through the area, making for poor visibility on the road on which Osborne was driving his pick-up truck. Osborne was driving along Route T680/Center Road (Center Road), a two-lane gravel road with barbed wire on the side of the road and trees on the property inside the barbed wire. Although the speed limit was 55 miles per hour, Osborne, who had a blood-alcohol level of . 191 at the time,[1] was driving approximately 72 miles per hour when he went over a knoll and soon after struck a large fallen oak tree approximately 54 inches in circumference - that was lying in a dip in the road across both

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1. The corner, Charles Winek , M.D., testifies that a person with a .191 blood-alcohol content would be significantly intoxicated, and would not have the sensory motor and judgment functions necessary to safely operate a motor vehicle. (N.T. atpp. 89, 100.)

lanes.[2] He died instantly.

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2. At oral argument, the Township stated that it had no police department but its streets were patrolled by the Pennsylvania State Police. State Trooper Adam Falkenburg testified at trial that upon arriving at the scene of the accident, he observed that the base of the tree that had fallen was level with the hood of Osborne's pick-up truck. (N.T. at p. 15.) He further stated that after the initial impact with the fallen tree, the pick-up truck went under the tree, causing an additional impact with another tree, and then the pick-up truck ca~ne to rest off an embankment. (N.T. at p. 16.)

Daniel Aerni, a traffic engineer who reconstructed accident scenes, testified on behalf of the Township and stated that there was about 500 feet from the crest of the hill to the dip where the tree was lying on the road, and that Osborne would have been able to see something in the road with his headlights illuminated. (N.T. at p. 45.) He further testified that he determined that Osborne was traveling at 72 m.p.h. upon impact with the tree; however, if he had used his brakes prior to hitting the tree, his estimation of the speed that he was travel ing would have been higher.

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Osborne's wife, acting in her capacity as Adminstratrix, filed wrongful death and survival actions against the Township alleging, *inter alia,* that the fallen tree was within its right-of-way and that it was negligent in its failure to take measures to warn the public that the large tree had fallen across one of its roads for which it had received timely notice. At the jury trial, the Township Road Master, Lawrence Tapper (Roadmaster Tapper), Township Supervisor Patrick Herman (Supervisor Herman), and a Township road worker Trace Fosburg (Roadworker Fosburg), testified that they had never received any complaints prior to the accident that the fallen tree needed maintenance or that it was rotting. Even Edward Styborski (Supervisor Styborski and abutting Landowner), the owner of the property on both sides of Center Street where the accident occurred and also a Township supervisor, testified that the fallen tree was fully leafed when it fell and he never complained that it required maintenance.

As to when the Township received notice and had an opportunity to respond to the tree in the road, Supervisor Styborski testified that when he went out that night, he saw the downed tree and told his wife to call one of the other supervisors. He could not recall, however, at what time he told his wife to make the call but thought it might have been a few hours before the accident occurred. Betty Styborski (Mrs. Styborski) testified that after her husband told her to make the phone call, she placed a call at 9:00 p.m. to Supervisor Herman but only spoke with his wife who told her he was sleeping. She further stated that she again called Supervisor Herman but when she reached Mrs. Herman instead, she told her there had been an accident.

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Contrary to Mrs. Styborski's testimony, Mrs. Herman testified that she received a call from Mrs. Styborski at 9:30 p.m. regarding the fallen tree, but told her that her husband was sleeping and to call someone else. Mrs. Herman also stated that Mrs. Styborski called again at 9:50 p.m. but spoke to her husband because he was getting up to go to work at his night shift position. Supervisor Herman's testimony echoed his wife's regarding the phone calls, but he also testified that even if he had gotten up at 9:30 p.m. to attend to the tree, it would have taken him approximately 20-30 minutes to get to the Township building to get barricades to put on the road and reach the tree. Similarly, Roadmaster Tapper stated that he heard about the accident on his police scanner between 9:15 and 9:30 p.m. but no one called him prior to that time to notify him that a tree was down.

The only evidence that the Township had possibly received notice in time to respond to the downed tree was Roadworker Fosburg's testimony that he spoke to Roadmaster Tapper one week after the accident and was told by him that Supervisor Herman had received notice of the fallen tree an hour prior to the accident.

Apparently considering the Decedent's condition and speed at which he was traveling at the time of the accident, the jury determined that he had been 25% negligent while the Township had been 75% negligent, and returned a verdict in favor of his estate for a total of $3,892,243.20 ($2,455,187.46 for the wrongful death action and $1,437,055.80 for the survival action). At the conclusion of the trial, the Township filed a motion for post-trial relief arguing that the judgment should have been

entered in its favor and requesting a new trial, remittitur and a molding of the verdict.[3] The Administratrix filed motions to mold the verdict[4] and award Rule 238 delay damages and post-verdict interest. The trial court denied the Township's request for post-trial relief except for its motion for remittitur, which was granted with respect to the survival action award in that it was reduced to zero. The trial court also molded the jury's wrongful death verdict of $2,455,187.46 by Osborne's comparative

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3. The Township requested remittitur (the process by which a jury verdict is diminished by subtracting portions of its award) alleging that the jury erroneously awarded a double recovery for both the wrongful death and survival actions and included damages for Decedent's guidance, tutelage and moral upbringing of his children; and it also failed to deduct the amount of Decedent's personal maintenance from the amount awarded. The Township also requested a molding of the verdict to reflect a cap on the amount awarded pursuant to the Political Subdivision Tort Claims Act, *infra, so* that the award would be capped at $500,000 for both the wrongful death and survival actions.

4. Countering the Township's request, the Administratrix requested that the verdict be molded to reflect an award of $1,000,000, arguing that the wrongful death action and survival action were separate actions and the award should not be capped at $500,000 for both.

negligence of 25% resulting in a verdict of $1,841,390.60. From that figure, $5,000 was subtracted for first-party insurance benefits that were paid. The total delay damages were then calculated to be $315,255.53[5] and the verdict was reduced to the statutory cap of $500,000 plus the delay damages for a total verdict of $813,255.53. The trial court entered judgment in favor of the Administratrix against the Township with costs and interest at the rate of 6% from the date of the verdict. Both the Township and the Administratrix filed appeals from that decision which are now before this Court.[6]

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5. Regarding delay damages, the trial court calculated them at 9.5% from June 29, 1996 to December 31, 1996, for a total of $88,901.43, and from January 1, 1997 through December 31, 1997, it calculated delay damages at 9.25% for a total of $169,866.13. Finally, for the period from January 1, 1998 through April 24, 1998, delay damages were calculated at 9.5% for a total of $54,487.97.

6. Our scope of review of the trial court's order denying the Township's motion for a new trial is limited to determining whether the trial court abused its discretion or committed an error of law that controlled the outcome of the case. *Cipolone v. Port Authority Transit System of Allegheny County*, 667 A.2d 474 (Pa. Cmwlth. 1995).

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I.

As to the notice requirement under 42 Pa. C.S. §8542(b)(4), the Township only contends that the trial court erred by refusing its request for a new trial because Roadworker Fosburg was permitted to testify as to a hearsay statement made to him by Roadmaster Tapper that Supervisor Herman had an hour's notice of the fallen tree prior to the accident. More specifically, Roadworker Fosburg testified that one week following the accident, he was informed by Roadmaster Tapper that Supervisor Herman told him that he had received notice of the fallen tree one hour prior to the Decedent's accident and had done nothing in response. Although the trial court found that the Township had failed to object to this testimony at trial and had waived any further right to object to the testimony, the Township argues that it did raise a hearsay objection at trial.

Whether the issue is preserved is determined by the following exchange between Christine Hurnyak (Ms. Hurnyak), Counsel for the Adrninistrahix; Roadworker Fosburg; John Dodick (Mr. Dodick), Counsei for the Township, and the Court:

Q. (by Ms. Hurnyak) Now, back in- I'm going to take you back to 1992 which would have been the year before the accident with Mr. Osborne. And I'm going to ask, did it come to your attention that a report had been made about a problem with trees on the Center Street Extension at the Styborski property?

A. (by Roadworker Fosburg) I had overheard Eddie Styborski and Larry Tapper.

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MR. DODICK: Your Honor, I'm going to object to this overhearing, I think, it's hearsay.

THE COURT: Well, it depends on whether he's going to testify to prior inconsistent statements. They both testified.

MR. DODICK: Yeah.

THE COURT: Why don't you come to side bar and you can tell me what he's going [sic] say at side bar.

SIDE BAR:

THE COURT: Is he going to say something inconsistent?

MS. HURNYAK: Yes.

THE COURT: What's he going to say?

MS. HURNYAK: Well, Mr. Tapper had denied that he had any report of a problem but Mr. Fosburg is going to say that Mr. Tapper and Mr. Styborski discussed the problem at the township building on more than one occasion.

THE COURT: Mr. Tapper said they never talked about the problem in the Township.

MS. HURNYAK: Correct.

THE COURT: Is he going to say anything else?

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MS. HURNYAK: He was at the scene the night of the accident and he is going to talk about a conversation that he had with Mr. Tapper about a week after the accident.

MR. DODICK: And what's - I mean, I don't understand. What is that conversation going to be?

MS. HURNYAK: That it's going to have to do with the notice on the night of the accident.

THE COURT: What's he going to say?

MS. HURNYAK: He's going to talk about how Mr. Tapper said that because the call came in like more than [sic] hour before the accident and Herman didn't do anything, that Herman is going to get us sued yet.

MR. DODICK: I don't understand. What is the evidence that call came in before, more than [sic] hour before the accident?

THE COURT: Well, if Mr. Tapper said that, then obviously that indicates - I guess, you could put him on and he could deny it or what are - I think, that's evidence in this case if he said he had a call - that Herman had a call an hour before. That's an inconsistency with the testimony that Herman certainly said.

Although the Administratrix argues that the objection initially made to Roadworker Fosburg's testimony regarding the trees on the road, the sidebar explained the objection also went to his testifying about the discussion between Roadmaster Tapper and Supervisor Herman. The trial court overruled that

objection finding that while it was hearsay, it was an admission against interest. As can be seen from the reading itself, this testimony was objected to by counsel for the Township.

The Township then argues that the trial court erred by allowing that testimony into evidence because it was not an admission against interest Roadworker Fosburg's testimony would have only been an admission against interest if he had been told by Supervisor Herman himself that he failed to take any action for over an hour. Instead, Roadworker Fosburg was going to testify about what Roadmaster Tapper was told by Supervisor Herman, and such testimony constitutes hearsay upon hearsay or double hearsay. In order for double hearsay to be admissible, the reliability and trustworthiness of each declarant must be independently established. *Commonwealth v. Scott,* 503 Pa. 62, 470 A.2d 91 (1983). This requirement is satisfied where *each* statement comes within an exception to the hearsay rule. *Commonwealth v. Galloway,* 448 A.2d 568 (Pa. Super. 1982). Because Roadmaster Tapper's statement would not be an exception to hearsay, the trial court erred by allowing this testimony in. Additionally, because this evidence was insufficient as to whether the Township had time to respond by placing barricades to block the road, i.e., notice, we would normally remand this case for a new trial on this basis alone. However, because of the manner in which we have disposed of the other issues, a remand is not necessary.

II.

The Township also contends that the trial court erred by refusing to grant judgment in its favor because there was

insufficient evidence offered at the trial to establish that the tree which Osborne struck with his pick-up truck was within its care, custody and control and would be an exception to the immunity afforded the Township under the Political Subdivision Tort Claims Act, also known as the Governmental Immunity Act, 42 Pa. C.S. §8541.[7] The section which provides the exception is found at 42 Pa. C.S. § 8542(b)(4) and states the following:

> *Trees, traffic controls and street lighting. - dangerous condition of trees,* traffic signs, lights or other traffic controls, street lights or street lighting *under the care, custody or control of the local agency,* except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency *had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event* to have taken

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7. 42 Pa. C.S. §8541 provides, "[e]xcept as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." 42 Pa. C.S. §8501 defines "local agency" as, "[a] government unit other than the Commonwealth government. The term includes an intermediate unit." Under this definition, the Township is a local agency and is subject to the provisions of the Sovereign Immunity Act. *See also Deluca v. Whitemarsh Township,* 526 A.2d 456 (Pa. Cmwlth. 1987).

measures to protect against the dangerous condition. (Emphasis added.)

A "sufficient period" is determined by the amount of time reasonably required to take protective measures, including inspections required by law. 42 Pa. C.S. § 8542(c). The time determination shall be made with reference to the actual equipment, personnel and facilities available to the local agency and competing demands therefore. *Id.*

In this case, none of the elements necessary to fall within the exception were met. First, no evidence was entered that the fallen tree was within the Township's care, custody or control because there was no evidence that the tree was on Township property or the open portion of the Township's road right-of-way. When the Administratrix sought to establish through the questioning of Supervisor Styborski that the tree that fell had stood on the Township's right-of-way, an objection was made by the Township's counsel that was sustained by the trial court.[8]

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8. Regarding the discussion as to whether the tree stood on the Township's right-of-way, the following exchange took place between Supervisor Styborski, Administratrixes counsel, the Township's counsel, and the trial court:

Q. (by Administratrix's counsel) Okay. And going back to the day of the accident, did there come a time when a tree that was along the road there came down?

(continued...)

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Moreover, no witness testified that the Township had performed work on the tree in question or that the tree was rotted. Supervisor Styborski stated that he was not aware of any work being performed on the trees along his property, including the tree that fell, and specifically stated that the tree that fell

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(...continued)
A. Right.
Q. And was that tree on the township right-of-way?

A. As far as I -

MR. DODICK (Counsel for Township): Objection, Your Honor.

THE COURT: Sustained.

MR. DODICK: I don't think this witness can testify to this.

THE COURT: You need more of a foundation if he is going [sic] testify to that. He can't thus far. Sustained.

(N.T. at p. 6.) When Supervisor Styborski was asked the same question again, the Township repeated its objection and the trial court again sustained the objection. Other than Supervisor Styborski's testimony, Roadworker Fosberg was the only witness who was asked about the tree being in the Township's right-of-way, and as with Supervisor Styborksi's testimony, Roadworker Fosberg's testimony was objected to by the Township and sustained by the trial court.

down was fully leafed and not rotted. Also, Roadmaster Tapper testified that there were no records indicating that work had been performed by the Township on the tree that caused Osborne's death or that anyone notified the Township that the tree was in a dangerous condition. Because there was no evidence to prove that the tree was under the Township's care, custody or control or that it had notice that the tree was defective, the "tree" exception to governmental immunity contained in 42 Pa. C.S. § 8542(b)(4) is not applicable.[9]

Even if the tree exception does not apply, the Administratrix nonetheless argues that the injuries are still actionable because the Township's negligence falls within the street exception to governmental immunity found at 42 Pa. C.S. § 8542(b)(6)(i).

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9. At oral argument, the Administratrix relied on Exhibit J - what she referred to as a survey of Center Road where the accident occurred - to establish that the fallen tree was in the Township's right-of-way. While Exhibit J was not in the reproduced record and the Administratrix did not raise this argument in her brief, we have, nonetheless, reviewed that exhibit and have determined that it is of no value whatsoever. The document is merely a hand drawn rendering of Center Road and is not drawn to size. Additionally, even if it was an accurate depiction of Center Road, there is no indication that the tree prior to falling was in any port of the Township's right-of-way for which it would be liable.

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That section provides that the Township may be liable for:

> A dangerous condition *of* streets owned by the local agency, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency *had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.* (Emphasis added.)

As with the trees, traffic controls and street lighting exception, a sufficient period of time is determined by the amount of time reasonably required to take protective measure. 42 Pa. C. S. § 8542(c).

The Township argues that the tree was not a dangerous condition *of* the street but rather a dangerous condition on the street for which it was not liable. The Administratrix contends, however, that focus of the exception is whether a dangerous condition existed on the street or road that the governmental entity failed to timely abate.

Whether a dangerous condition must be "of" or "on" the road has been the subject of numerous cases involving the exceptions waiving immunity for both commonwealth agencies and local agencies relative to real property, highways, streets and utility

facilities.[10] While there are major differences between them, at the core of them all is that immunity is waived for a "dangerous condition of" the real estate, highway, street, traffic signal or other type of improvement.[11]

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10. See 42 Pa. C.S. § 8522(b)(4) which provides: A dangerous condition *of* Commonwealth agency real estate and sidewalks, including Commonwealth-owned real property, leaseholds in the possession of a Commonwealth agency and Commonwealth-owned real property leased by a Commonwealth agency to private persons, and highways under the jurisdiction of a Commonwealth agency, except conditions described in paragraph (5). (Emphasis added.) We note that statutes dealing with governmental and sovereign immunity are to be interpreted consistently beeause they deal with indistinguishable subject matter. *Kilgore v. City of Philadelphia,* 553 Pa. 22, 717 A.2d 514, n.4 (1998).

11. The only exception that does not have that core language is the real property exception for local agencies that waives immunity instead for acts arising out of "[t]he care, custody or control of real property in the possession of the local agency." Because this exception does not contain the "dangerous condition oft' language contained in other exceptions, our Supreme Court in *Grieff v. Reisinger,* 548

(continued...)

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When these exceptions were first construed, the analysis focused on whether the governmental conduct created or allowed to be maintained a "dangerous condition" that should have been corrected. Those initial cases interpreted the term "dangerous condition" broadly as a state of affairs that hampered or impeded or required correction. "[I]t is clear that circumstances here give rise to a condition that is related to travel on the highway and is conceivably correctable. "*Wyke v. Ward,* 474 A.2d 375, 379 (Pa. Cmwlth 1984) (quoting the plurality decision in *Mistecka v. Commonwealth,* 408 A.2d 159 (Pa. Cmwlth 1979) (question as to whether dangerous condition existed where individuals were throwing rocks down at cars from bridge above state-maintained road)). Because the focus was on whether a condition was dangerous, it was a question for the fact finder and not to be determined by the court as a matter of law. *Wyke; see also Fidanza v. Commonwealth of Pennsylvania,* 655 A.2d 1076 (Pa. Cmwlth), *petition for allowance of appeal denied,* 542 Pa. 677, 668 A.2d 1138 (1995); *Department of Transportation v. Phillips,* 488 A.2d 77 (Pa. Cmwlth 1985) (relating to treatment of artificial defects prior to formulation of principle set forth in *Mascaro v. Youth Study Center,* 514 Pa. 351, 523 A.2d 1118 (1987)).

(...continued)
Pa. 13, 693 A.2d 195 (1997) abandoned the "on-of" analysis for the real estate exception for local agencies. *See also Kilgore, supra; Snyder v. North Allegheny School District,* 722 A.2d 239 (Pa. Cmwlth. 1998).

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But this approach to determine what was a dangerous condition was effectively superseded, *see Rippey v. Fogel*, 529 A.2d 608, 610 fn.1 (Pa. Cmwlth. 1987), by our Supreme Court's decision in *Mascaro* when it established the test that a "dangerous condition of" the real estate had to be one that was inherent in the property and directly caused the injury. By posing the test this way, the focus of the analysis changed from one that examined whether a "condition" was dangerous to an analysis that determined whether the condition is "of" the property. For example, if there was oil and grease on the public property and someone was injured as a result, that was not within the exception, no matter whether it was a dangerous condition because it was "on" the property but not "oft' the property. The change in focus also changed the question from one of fact to one of law. Because the "dangerous condition" was known and because the plaintiff was required to plead it in the complaint, whether it was "of" the real property involved nothing more than a legal interpretation of whether known conduct fell within the words of an exception. Of course, if it was determined to be "of" the property, then it was a question for the fact finder.

However, in *Bendas v. Township of White Deer*, 531 Pa. 180, 611 A.2d 1184 (1992), our Supreme Court, in a case dealing with the highway exception and echoing *pre-Mascaro* cases, appeared to revert to an analysis that examined whether the governmental entity's conduct in allowing a "dangerous condition" to exist violated a public duty to keep the highway safe for the traveling public. In *McCalla v. Borough of Jefferson*, 538 Pa. 527, 649 A.2d 646 (1994), while deeply divided on other issues, our Supreme Court appeared to have extended the *Bendas* rationale to the street exception applicable

to local agencies.

Shortly after *Bendas was* decided, through, our Supreme Court decided *Kiley v. City of Philadelphia,* 537 Pa. 502, 645 A.2d 184 (1994), a case involving what was a "dangerous condition of" a sidewalk. The Court returned to the traditional "on-of" analysis holding that where a child was permanently injured when he had to go into the street because the sidewalk next to a city-owned building was blocked by demolition material was not a defect of the real estate. It stated that "it is not enough to assert that the [real property] constituted a dangerous condition.... We have consistently maintained our views that the focus of the negligent act involving the use of government owned or controlled land ... must be the actual defect of the land itself and that the rule of immunity can be waived in those cases where it is alleged that the artificial condition or defect of the land itself causes the injury." *Id.* at 508, 645 A.2d at 187.

The last time that our Supreme Court addressed what was a "dangerous condition of" property was in *Finn v. City of Philadelphia,* 541 Pa. 596, 664 A.2d 1342 (1995), where again our Supreme Court applied an "on-of" analysis. In that case, a person was injured as a result of falling down on grease that accumulated on a city-owned sidewalk from cars that regularly parked on it; however, because the grease was on and not part of the sidewalk, it was held not to be a physical defect of the property. Under *Finn,* a two-prong analysis is employed: "first, a legal determination that an injury was caused by a condition of government realty itself, deriving, originating from, or having the realty as its source, and, only then, the factual determination that the condition was dangerous. " *Id.* at 604, 664 A.2d at 1346.

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Even though *Finn* involves the sidewalk exception, the reasoning is equally applicable to the highway exception but even more so because it distinguishes *Bendas.*[12]

---

12. We also have applied the "on-of" distinction in *Mason & Dixon Lines, Inc. v. Mognet,* 645 A.2d 1370 (Pa. Cmwlth. 1994), where there was a break in the fence along the turnpike that allowed a cow that escaped from a farm miles away to enter onto the turnpike causing a vehicle to be destroyed by a tractor-trailer truck. Finding that the cow was not a defect of the highway and the fence did not cause the accident, the court refused to hold that the exception applied.

See also City of Philadelphia v. Melendez, 627 A.2d 234 (Pa. Cmwlth. 1993), where a driver was injured when her car collided with another vehicle because her view was obstructed by a car that was owned by the City of Philadelphia and was unlawfully parked along the curb of her street. She filed an action under 42 Pa. C.S. §8542(b)(6)(i) alleging that the street exception to immunity applied because the street and the car parked on the street were owned by the City of Philadelphia, the car was presumably placed on the street by a City of Philadelphia employee, and the City of Philadelphia must have known that a dangerous condition existed on the street. Rejecting Melendez's argument, this Court stated:

The above-cited language (referring to Section 8542(b)(6)(i)) unambiguously states that the dangerous

(continued...)

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Because *Finn* controls, the dangerous condition to fall within the street exception must arise from the real estate, street or sidewalk rather than from something that has fallen onto the real estate, street or sidewalk. Because the fallen tree was not "of" the real estate but "on" the real estate, the street exception to governmental immunity does not apply and judgment should have been entered in favor of the Township.[13]

Accordingly, the decision of the trial court is reversed.

DAN PELLEGRINI, JUDGE

(...continued)
condition must be that *of* the street, not on the street. The condition must derive' originate from or have as its source the City's realty. (Citations omitted.) Accordingly, we conclude that even if the accident were caused by the presence of the city-owned vehicle parked on a City-owned street, as a matter of law, the streets exception to governmental immunity would not apply. (Emphasis in original.)

Id. at 627.

13. Because of the way that we have resolved this case, we need not address the cross appeal raising issues related to the damages awarded.

APPENDIX

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JEANNETTE M. OSBORNE, an individual and Administratrix of the Estate of STEPHEN K. OSBORNE, Deceased	:	
v.	:	NO. 2755 C.D. 1998
CAMBRIDGE TOWNSHIP, Appellant	:	
JEANNETTE M. OSBORNE, an individual and Administratrix of the Estate of STEPHEN K. OSBORNE,Deceased, Appellant	:	
v.	:	NO.2856C.D. 1998
CAMBRIDGE TOWNSHIP	:	ARGUED: June 17,1999

ORDER

AND NOW, this 16th day of July, 1999, the order of the Court of Common Pleas of Crawford County, dated September 14, 1998, is reversed.

DAN PELLEGRINI, JUDGE

APPENDIX

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JEANNETTE M. OSBORNE, an individual and Administratrix of the Estate of STEPHEN K. OSBORNE, Deceased	:	
v.	:	NO. 2755 C. D. 1998
CAMBRIDGE TOWNSHIP, Appellant	:	
JEANNETTE M. OSBORNE, an individual and Administratrix of the Estate of STEPHEN K. OSBORNE, Deceased, Appellant	:	
v.	:	NO. 2856 C. D. 1998
CAMBRIDGE TOWNSHIP	:	

PER CURIAM

ORDER

NOW, September 24, 1999, having considered appellee's petition for reargument and appellant's answer in opposition, the petition is denied.

CERTIFIED FROM THE RECORD

APPENDIX

AND ORDER EXIT
SEP 2 7 1999

/s/
Deputy Prothonotary - Chief Clerk

APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

JEANETTE OSBORNE, AN INDIVIDUAL AND ADMINISTRATRIX OF THE ESTATE OF STEPHEN K. OSBORNE, DECEASED,	:	Nos. 704 & 705 Western District Allocatur Docket 1999
Petitioner	:	Petition for Allowance of Appeal from the Commonwealth Court
v.	:	
CAMBRIDGE TOWNSHIP,	:	
Respondent	:	

ORDER

PER CURIAM:

AND NOW, this 11th day of May, 2000, the Petitions for Allowance of Appeal are hereby denied.

A True Copy Patricia Honard
As of: May 11, 2000
Attest:/s/_____
Chief Clerk
Supreme Court of Pennsylvania

APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIAWESTERN DISTRICT

JEANNETTE M. OSBORNE, AN INDIVIDUAL AND ADMINISTRATRIX OF THE ESTATE OF STEPHEN K. OSBORNE, DECEASED,	: Nos. 704 & 705 : Western District : Allocatur Docket : 1999
Petitioner	: Application for : Reconsideration : of this Court's
v.	: Order Denying : Allocance of
CAMBRIDGE TOWNSHIP,	: Appeal :
Respondent	:

ORDER

PER CURIAM:

AND NOW, this 21st day of August, 2000, the Application for Reconsideration of this Court's Order denying Allowance of Appeal is hereby denied.

A True Copy Shelly A. Carrara
As of: August 21, 2000
Attest:/s/_____
Deputy Prothonotary
Supreme Court of Pennsylvania

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(Cite as: 748 A.2d 1271, 2000 WL 155710 (Pa.Cmwlth.))

Commonwealth Court of Pennsylvania.
Crystal JONES, Appellant,
v.
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

Argued May 20, 1999.
Decided Feb. 15, 2000.

Reargument and Request for Hearing Denied April 24, 2000.

Passenger brought action against the Southeastern Pennsylvania Transportation Authority (SEPTA), alleging she sustained personal injuries caused by slipping on rock salt that was on a train platform. The Court of Common Pleas, Philadelphia County, No. 2675 May Term 1997, Tereshko, J., granted summary judgment to SEPTA, and passenger appealed. The Commonwealth Court, No. 1430 C.D. 1998, Smith, J., held that SEPTA enjoyed sovereign immunity from personal injury claim, in that rock salt that was "on" the train platform was not a defect "of" the platform.

Affirmed.

Doyle, President Judge, filed a dissenting opinion.

[1] Appeal and Error 949
30k949

APPENDIX

The Commonwealth Court's review of a trial court's grant of summary judgment is limited to determining whether the trial court committed an error of law or an abuse of discretion.

[2] Carriers k306(1)
70k306(1)

Rock salt that was "on" Southeastern Pennsylvania Transportation Authority's (SEPTA) train platform was not a defect "of" the platform, and thus, SEPTA enjoyed sovereign immunity from passenger's personal injury claim, where passenger's fall was allegedly a result of slipping on rock salt on the platform, and passenger did not see any holes or defects in the platform's floor. 42 Pa.C.S.A. s 8522(b).

John F. McCabe, Philadelphia, for appellant.

Joan A. Zubras, Philadelphia, for appellee.

Before DOYLE, President Judge, SMITH, J., and NARICK, Senior Judge.

SMITH, Judge.

*1 Crystal Jones appeals from the order of the Court of Common Pleas of Philadelphia County that granted summary judgment to the Southeastern Pennsylvania Transportation Authority (SEPTA) and dismissed her civil action for damages. [FN1] Jones questions whether her claims meet the exception to sovereign immunity for dangerous conditions of Commonwealth

real estate as provided in Section 8522(b)(4) of the Judicial Code, 42 Pa.C.S. s 8522(b)(4).

Jones filed a complaint against SEPTA on May 27, 1997 alleging that she suffered serious and permanent injuries on December 23, 1996 when she slipped and fell on *1272 rock salt on the train platform in SEPTA's Fern Rock Station in the City of Philadelphia. SEPTA filed a timely answer with new matter asserting immunity either under Sections 8541-8564 of the Judicial Code, 42 Pa.C.S. §§8541-8564, relating to governmental or local agency immunity, or under Sections 8521-8528, 42 Pa.C.S. §§ 8521-8528, relating to sovereign immunity. In her deposition Jones testified that she slid on the rock salt that was on the platform floor and fell; she did not see any holes or defects in the floor, and her testimony was that she slid and fell because of the rock salt.

SEPTA filed a motion for summary judgment on March 19, 1998. SEPTA noted that the Supreme Court has held that it is a Commonwealth agency to which the sovereign immunity provisions of the Judicial Code apply, citing Feingold v. Southeastern Pennsylvania Transportation Authority, 512 Pa. 567, 517 A.2d 1270 (1986). It asserted that the only exception to sovereign immunity under which Jones' claim would arguably fall is that in Section 8522(b)(4), 42 Pa.C.S. §8522(b)(4), which authorizes liability for damages caused by "[a] dangerous condition of Commonwealth agency real estate and sidewalks...." Because Jones' complaint alleged only injury due to rock salt "on" the platform rather than some defect "of" the platform itself, SEPTA argued that she had failed to state a cause of action falling within Section 8522(b)(4) or any other immunity

exception. The trial court agreed with SEPTA's position and granted summary judgment in its favor and dismissed Jones' complaint with prejudice by order of April 29, 1998.

[1] Summary judgment is properly granted where "there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report." Pa. R.C.P. No. 1035.2(1). After the close of discovery relevant to the motion, summary judgment is also appropriate if "an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury." Pa. R.C.P. No. 1035.2(2). An entry of summary judgment may be granted only in cases where the right is clear and free from doubt. Davis v. Brennan, 698 A.2d 1382 (Pa.Cmwlth.1997). The moving party has the burden of proving the non-existence of any genuine issue of material fact. Id. Parties seeking to avoid the imposition of summary judgment must show by specific facts in their depositions, answers to interrogatories, admissions or affidavits that there is a genuine issue for trial. Sovich v. Shaughnessy, 705 A.2d 942 (Pa.Cmwlth.1998). [FN2]

*2 Jones begins by indirectly acknowledging that former case law did recognize the distinction between dangerous conditions "on" real property, for which Commonwealth parties were immune, and dangerous conditions "of" the real property, for which they could be liable. Jones contends, however, that the Supreme Court's decisions in Grieff v. Reisinger, 548 Pa. 13, 693 A.2d 195 (1997), and Kilgore v. City of Philadelphia, 553 Pa. 22, 717 A.2d 514 (1998), have rendered the "on"/"of"

distinction an outdated and abrogated legal standard that has been overruled sub silentio. Jones asserts that City employees were negligent by placing the rock salt on the platform when it snowed several days before her injury and then failing to remove it in a timely manner.

In Grieff a visitor to a volunteer fire company was burned when paint thinner that was being used to clean the floor ran under a refrigerator and ignited. The Supreme Court held that the injured visitor stated a cause of action under Section 8542(b)(3), relating to local agency real *1273 property exception to immunity. It distinguished Mascaro v. Youth Study Center, 514 Pa. 351, 523 A.2d 1118 (1987), and Snyder v. Harmon, 522 Pa. 424, 562 A.2d 307 (1989), by stating that Mascaro and its progeny were intended to apply where third parties caused the harm. In Kilgore a vehicle on City-owned property went out of control because of accumulated ice and snow and struck the plaintiff. The Supreme Court held that the plaintiff's cause of action met the threshold conditions of stating a claim for which recovery could be had against one not enjoying an immunity defense and alleging negligence of local agency employees. Further, the court concluded that the complaint properly alleged conduct relating to the "care, custody or control of real property" under Section 8542(b)(3) relating to locale agency real property exception to immunity.

Jones acknowledges that Grieff and Kilgore were decided under the exception to immunity for local agency real property. She asserts, however, that the Supreme Court has stated repeatedly that the sovereign and governmental immunity exceptions are identical, and their interpretation should be

identical as well, citing Finn v. City of Philadelphia, 541 Pa. 596, 664 A.2d 1342 (1995). In response SEPTA emphasizes that Grieff and Kilgore were decided under the real property exception to governmental immunity in Section 8542(b)(3), for negligence relating to the "care, custody or control" of real property, rather than the real property exception to sovereign immunity in Section 8522(b)(4), which requires proof of a "dangerous condition of Commonwealth agency real estate and sidewalks...."

*3 This Court has addressed the question of the proper interpretation of the sovereign immunity and governmental immunity real property exceptions in several decisions since Grieff. In Abella v. City of Philadelphia, 703 A.2d 547 (Pa.Cmwlth.1997), appeal denied, 555 Pa. 746, 725 A.2d 1222 (1998), the plaintiff allegedly slipped and fell on hills and ridges of ice and snow outside the State Office Building in Philadelphia. After the City of Philadelphia was dismissed from the case, the only remaining question was whether the real property exception to sovereign immunity in Section 8522(b)(4) applied. The Court stated that, although the "of"/"on" distinction had been abolished in regard to the governmental immunity real property exception, there had been no ruling from the Supreme Court that it had been displaced in regard to the sovereign immunity exception. [FN3]

More recently, in Murphy v. Commonwealth, Department of Transportation, 733 A.2d 688 (Pa.Cmwlth.1999), the issue on the merits of the appeal was whether the plaintiff's allegations that she was injured in an automobile crash when she swerved to avoid a discarded muffler in a state roadway stated a claim that

was cognizable under Section 8522(b)(4), which, in addition to real estate and sidewalks, also applies to "[a] dangerous condition of ... highways under the jurisdiction of a Commonwealth agency...." The Court concluded that the "of"/ "on" distinction continued to apply to claims under Section 8522(b)(4) and affirmed the order of the trial court sustaining preliminary objections filed by the Department of Transportation on that basis. See also Tallada v. East Stroudsburg University of Pennsylvania, 724 A.2d 427 (Pa.Cmwlth.1999) (holding that a state university was immune from liability under Section 8522(b)(4) where the plaintiff alleged that she fell while working in a dining *1274 facility because contents of a kettle leaked onto the floor).

[2] The stated rationale of Grieff turned on the language of the real property exception to governmental immunity that is different from that of the real property exception to sovereign immunity, and this Court consistently has held that the "of"/"on" distinction continues to apply to the latter. In the present case, Jones did not plead or testify in her deposition that there was any defect "of" the floor where she fell; to the contrary, she alleged that her fall was caused by rock salt "on" the platform. Therefore, the trial court correctly granted summary judgment to SEPTA pursuant to Section 8522(b)(4) of the Judicial Code.

ORDER

AND NOW, this 15th day of February, 2000, the order of the Court of Common Pleas of Philadelphia County is affirmed.

Dissenting opinion by President Judge DOYLE.

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DOYLE, President Judge, dissenting.

*4 I respectfully dissent to the majority's holding that the "of/on" analysis, established by our Supreme Court in Finn v. City of Philadelphia, 541 Pa. 596, 664 A.2d 1342 (1995), continues to apply to the real property exception to Sovereign Immunity, 42
Pa.C.S. s 8522(b)(4).

In Finn, the plaintiff sustained injuries when she fell on an accumulation of grease on a Philadelphia sidewalk. As part of its discussion of the sidewalk exception, 42 Pa.C.S. §8542(b)(7), the Supreme Court concluded that, in order for a claim to fit within either the sidewalk exception or the real property exception to governmental immunity, 42 Pa.C.S. §8542(b)(3), a plaintiff must establish that he or she was injured by a defect of the real property itself, rather than a defect on the realty. The Supreme Court reasoned:

> The common theme of all these cases is that liability depends, first, on the legal determination that an injury was caused by a condition of government realty itself, deriving, originating from, or having the realty as its source, and, only then, the factual determination that the condition was dangerous.
>
> What is necessary, therefore, to pierce the Commonwealth agency's immunity is proof of a defect of the [real property] itself. Such proof might include an improperly designed

> sidewalk, an improperly constructed sidewalk, or a badly maintained, deteriorating, crumbling sidewalk.

Finn, 541 Pa. at 605, 664 A.2d at 1346. See also Kiley by Kiley v. City of Philadelphia, 537 Pa. 502, 645 A.2d 184 (1994).

While Finn was decided under governmental immunity law, the same analysis had been employed by the Supreme Court in sovereign immunity cases. Snyder v. Harmon, 522 Pa. 424, 562 A.2d 307 (1989).

However, since Finn was decided, the Supreme Court has rejected the on/of analysis in two cases, Grieff v. Reisinger, 548 Pa. 13, 693 A.2d 195 (1997), and Kilgore v. City of Philadelphia, 553 Pa. 22, 717 A.2d 514 (1998), both of which involved the real estate exception to governmental immunity. In my view, Kilgore controls the outcome of the instant case.

In Kilgore, the plaintiff was injured at the Philadelphia Airport when he was struck by a motorized "tug," which went out of control as a result of an accumulation of ice and snow on the Airport's property. The Supreme Court, without discussing or even recognizing the on/of analysis articulated in Finn, determined that the claim fell within the real property exception to government immunity:

> [T]he Kilgores claim damages for injuries caused by the negligence of the City in the manner in which it maintained its property. They claim that the City breached its obligation to remove snow

> *1275 and ice from the roadway area. Under the facts as alleged, the Kilgores meet the two threshold conditions to bring an action under the Act since, under common law, they could recover if Mr. Kilgore had fallen on private property, and it is alleged that the City's active negligence was a direct cause of this accident.... Additionally, it is alleged that the City's failure to remove ice and snow following an earlier storm was related to the 'care, custody and control of real property in possession of the local agency' ... and was a direct cause of the accident....

*5 Kilgore, 553 Pa. at 28, 717 A.2d at 517 (citations omitted).

In a dissenting opinion, Justice Castille argued that Finn barred the plaintiff's claim, and he emphatically asserted that, by failing to acknowledge its prior decision in Finn, the Supreme Court has "sub silentio overruled it, and in so doing, has abandoned the principle of stare decisis." Kilgore, 553 Pa. at 30, 717 A.2d at 518 (Castille, Justice, dissenting).

In the present case, I believe that this Court is obligated to follow the latest pronouncement of our Supreme Court indicating the state of the law in the area of immunity. Although Kilgore involved a governmental immunity issue and the present case involves the real estate exception to sovereign immunity, I nonetheless conclude that Kilgore is both applicable and controlling, especially in light of the well-established principle that governmental and sovereign immunity statutes are to be read

consistently, provided that such a reading does not ignore the plain language chosen by the General Assembly. Accordingly, based on Kilgore, I would conclude that this Court is constrained to reverse the Common Pleas Court's order and remand this case for trial. [FN1]

FN1. This case was reassigned to this opinion writer on October 22, 1999.

FN2. The Court's review of a trial court's grant of summary judgment is limited to determining whether the trial court committed an error of law or an abuse of discretion. Beitler v. City of Philadelphia, 738 A.2d 37 (Pa.Cmwlth. 1999).

FN3. In Snyder v. North Allegheny School Dist., 722 A.2d239 (Pa.Cmwlth. 1338), a plaintiff slipped and fell on ice on a concrete landing at the top of a set of stairs adjacent to a high school driveway after she left a function at the school. The Court's initial inquiry was whether the accident happened on a "sidewalk," in which case the Section 8542(b)(7) "dangerous condition of sidewalks" requirement would apply, or on the other real property of the school district. Concluding that the site of the accident was not a part of the sidewalk, the Court held that the broader liability for negligence in the care, custody or control of the real property applied.

DISSENTING OPINION

FN1. I recognize that this Court recently applied Finn in

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Osborne v. Cambridge Township, 736 A.2d 715 (Pa.Cmwlth.1999), which essentially holds that the on/of distinction continues to apply to exceptions to governmental immunity that contain the specific language providing that immunity is waived for a "dangerous condition of" the subject improvement. Since the real property exception to sovereign immunity contains this core language "dangerous condition of", under Osborne, the on/of distinction would apply to this exception also. The Osborne Court noted that the real property exception to governmental immunity does not contain the core language, but rather states that immunity is waived for injuries caused by the "care, custody, or control" of real property and therefore explains away the Supreme Court's decision to abandon the on/of distinction in Grieff and Kilgore. I disagree with this analysis and believe that Osborne has carved out an exception to the symmetry of the overall statutory scheme and has created a dichotomy between sovereign immunity and governmental immunity which was never intended by the Legislature nor by the Supreme Court in Grieff and Kilgore.

For the reasons stated in the body of this dissenting opinion, I believe that Osborne fails to properly consider the change in the law created by the Supreme Court in Grieff and Kilgore. Unless the Supreme Court reverses other established case law, Osborne violates the well- established rule that the exceptions to sovereign immunity and governmental immunity are to be interpreted consistently, again pointing out that the Supreme Court has specifically concluded that the real property exception to government immunity is to be construed in a manner that is consistent with the other exceptions to immunity. Kiley.

APPENDIX

PURDON'S PENNSYLVANIA CONSOLIDATED STATUTES ANNOTATED TITLE 42. JUDICIARY AND JUDICIAL PROCEDURE PART VII. CIVIL ACTIONS AND PROCEEDINGS CHAPTER 85. MATTERS AFFECTING GOVERNMENT UNITS SUBCHAPTER C. ACTIONS AGAINST LOCAL PARTIES GOVERNMENTAL IMMUNITY COPR. (C) WEST 1993 No Claim to Orig. Govt. Works

§ 8541 Governmental immunity generally

Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person/

1982 Main Volume Credits (s)

1980, Oct. 5, P.L. 639 No. 142, § 221(1), effective in 60 days.

APPENDIX

PURDON'S PENNSYLVANIA CONSOLIDATED STATUTES ANNOTATED TITLE 42. JUDICIARY AND JUDICIAL PROCEDURE PART VII. CIVIL ACTIONS AND PROCEEDINGS CHAPTER 85. MATTERS AFFECTING GOVERNMENT UNITS SUBCHAPTER C. ACTIONS AGAINST LOCAL PARTIES GOVERNMENTAL IMMUNITY COPR. (C) WEST 1993 No Claim to Orig. Govt. Works

§ 8542. Exceptions to governmental immunity

(a) Liability imposed.--A local agency shall be liable for damages on account of an injury to a person or property within the limits set forth in this subchapter if both of the following conditions are satisfied and the injury occurs as a result of one of the acts set forth in subsection (b):

(1) The damages would be recoverable under common law or a statute creating a cause of action if the injury were caused by a person not having available a defense under section 8541 (relating to governmental immunity generally) or section 8546 (relating to defense of official immunity); and

(2) The injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b). As used in this paragraph, "negligent acts" shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct.

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(b) Acts which may impose liability.--The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:

(1) Vehicle liability.--The operation of any motor vehicle in the possession or control of the local agency. As used in this paragraph, "motor vehicle" means any vehicle which is self-propelled and any attachment thereto, including vehicles operated by rail, through water or in the air.

(2) Care, custody or control of personal property.--The care, custody or control of personal property of others in the possession or control of the local agency. The only losses for which damages shall be recoverable under this paragraph are those property losses suffered with respect to the personal property in the possession or control of the local agency.

(3) Real property.--The care, custody or control of real property in the possession of the local agency, except that the local agency shall not be liable for damages on account of any injury sustained by a person intentionally trespassing on real property in the possession of the local agency. A used in this paragraph, "real property" shall not include:

(i) trees, traffic signs, lights and other traffic controls, street lights and street lighting systems;

(ii) facilities of steam, sewer, water, gas and electric systems owned by the local agency and located within rights-of-way;

(iii) streets; or

(iv) sidewalks.

(4) Trees, traffic controls and street lighting.--A dangerous condition of trees, traffic signs, lights or other traffic controls, street lights or street lighting systems under the care, custody or control of the local agency, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.

(5) Utility service facilities.--A dangerous condition of the facilities of steam, sewer, water, gas or electric systems owned by the local agency and located within rights-of-way, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken

measures to protect against the dangerous condition.

(6) Streets.--

(i) A dangerous condition of streets owned by the local agency, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.

(ii) A dangerous condition of streets owned or under the jurisdiction of Commonwealth agencies, if all of the following conditions are met:

(A) The local agency has entered into a written contract with a Commonwealth agency for the maintenance and repair by the local agency of such streets and the contract either:

(i) had not expired or been otherwise terminated prior to the occurrence of the injury; or

(ii) if expired, contained a provision that

expressly established local agency responsibility beyond the term of the contract for injuries arising out of the local agency's work.

(B) The injury and dangerous condition were directly caused by the negligent performance of its duties under such contract.

(C) The claimant must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.

(7) Sidewalks.--A dangerous condition of sidewalks within the rights-of-way of streets owned by the local agency, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition. When a local agency is liable for damages under this paragraph by reason of its power and authority to require installation and repair of sidewalks under the

care, custody and control of other persons, the local agency shall be secondarily liable only and such other persons shall be primarily liable.

(8) Care, custody or control of animals.--The care, custody or control of animals in the possession or control of a local agency, including but not limited to police dogs and horses. Damages shall not be recoverable under this paragraph on account of any injury caused by wild animals, including but not limited to bears and deer, except as otherwise provided by statute.

(c) Limited definition.--As used in this section the amount of time reasonably required to take protective measures, including inspections required by law, shall be determined with reference to the actual equipment, personnel and facilities available to the local agency and the competing demands therefor.

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1980, Oct. 5, P.L. 693, No. 142, s 221(l), effective in 60 days. As amended 1982, June 10, P.L. 452, No. 132, s 1, imd. effective.

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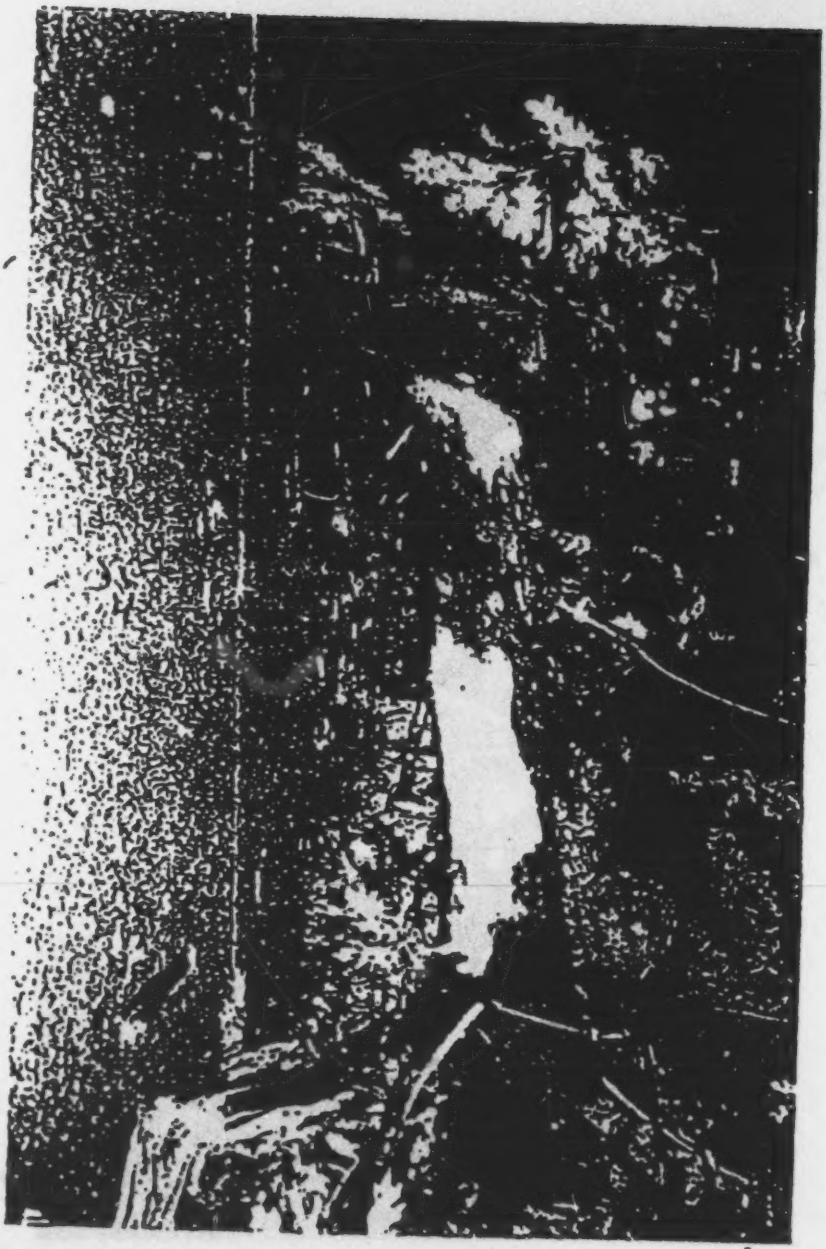

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